

No. PD-0653-20

In the
Court of Criminal Appeals
At Austin

FILED
COURT OF CRIMINAL APPEALS
2/23/2021
DEANA WILLIAMSON, CLERK

—◆—
RAUL BAHENA

Petitioner

V.

THE STATE OF TEXAS

Respondent
—◆—

STATE RESPONDENT'S RESPONSE BRIEF
—◆—

KIM OGG

District Attorney
Harris County, Texas

JOHN DAVID CRUMP

State Bar No: 24077221
Assistant District Attorney
Harris County, Texas

JASON SANCHEZ

JAMIE BURRO

Assistant District Attorneys
Harris County, Texas

500 Jefferson, 6th Floor
Houston, Texas 77002
Tel.: 713/755-5826
FAX No.: 713/755-5809

Attorneys for Respondent

STATEMENT REGARDING ORAL ARGUMENT

This Court has ordered that oral argument will not be granted.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A) , a complete list of the names of all interested parties is provided below so the members of this Honorable Court may at once determine whether they are disqualified to serve or should recuse themselves from participating in the decision of the case.

Counsel for the Respondent:

Kim Ogg — District Attorney of Harris County

John David Crump — Assistant District Attorney on appeal

Jason Sanchez — Assistant District Attorney at trial

Jamie Burrow — Assistant District Attorney at trial

Petitioner:

Raul Bahena

Counsel for Petitioner:

Patricia Segura — Defense counsel at trial

Terry Gaiser — Defense counsel at trial

Crespin Michael Linton — Defense counsel on appeal

Judges:

Honorable Leslie Brock Yates — Judge presiding at trial

Chief Justice Frost, Justices Wise & Hassan — Justices on appeal

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT OF THE CASE

On Aug. 16, 2017, Petitioner was indicted for the felony offense of aggravated robbery by use or exhibition of a deadly weapon, which occurred on May 20, 2017. (C.R. 22). On Aug. 23, 2018, a petit jury found Petitioner guilty of the offense as charged in the indictment, and the trial court assessed Petitioner's punishment at 25 years in the Institutional Division of the Texas Department of Criminal Justice. (C.R. 113-114). On the same date, Petitioner gave his notice of appeal, and the trial court certified the same. (C.R. 117; 119). On June 23, 2020, a panel of the Court of Appeals for the Fourteenth District upheld Petitioner's conviction, overruling Petitioner's sufficiency claims, a claim related to the lack of a jury instruction and Petitioner's claims regarding jail calls. *Bahena v. State*, 604 S.W.3d 527 (Tex. App.—Houston [14th Dist.] 2020, pet. filed). Justice Hassan filed a dissent related to the jail call issue. *Id.* at 538-48 (Hassan, J., dissenting).

ISSUE PRESENTED

Whether the court of appeals correctly upheld trial court's admission of Petitioner's jail calls where the State presented a custodian of records for the Harris County Sheriff's Office that was familiar with the method of generating, gathering and disseminating the records, and the generation, gathering and dissemination of the record in this case.

STATEMENT OF FACTS

In the evening hours of May 20, 2017, Petitioner robbed M. Soria, the complainant in this case, with a gun. (R.R. III 08-09). Soria had just gotten off working the night shift at a Subway, where she was an assistant manager. (R.R. III 09). A friend from school, Dominique, picked Soria up and they went to a local park. (R.R. III 11). Soria had roughly 15 minutes before she was due home for curfew and spent it with Dominique in a car at the park. (R.R. III 11; 15). The area was “[p]retty well-lit.” (R.R. III 15).

After being at the park for approximately two to three minutes, Petitioner “showed up.” (R.R. III 16). Soria was familiar with Petitioner as they went to the same middle school, and Soria was friends with Petitioner’s cousin. *Id.* Petitioner approached the car. (R.R. III 18). Dominique’s car’s window was down, and Petitioner asked for a cigarette. *Id.* After Soria and Dominique told Petitioner that they did not have a cigarette, Petitioner walked away. *Id.* Petitioner returned 30 seconds later and displayed a gun. (R.R. III 22).

Petitioner told Soria and Dominique, “this is a stick up...[g]ive me everything you have.” *Id.* Petitioner was holding a “black handgun,” which Soria was certain was a gun. *Id.* Soria was scared that Petitioner was going to kill her. (R.R. III 37). Dominique tried to calm Petitioner down, but Petitioner demanded what they had in the car. (R.R. III 23). Petitioner then specifically demanded Soria’s purse. *Id.* Soria, not having her purse at the time, gave Petitioner her backpack, and Dominique gave

Petitioner his hat. (R.R. III 24). Petitioner was waving the gun around and cocked it several times. (R.R. 24; 26). At one point, Soria began to believe that, while the gun was a firearm, it was not loaded. (R.R. III 25-26).

Eventually, even though Petitioner continued to demand more property, Dominique was able to start the car and sped off. (R.R. III 26-27). Soria's backpack and much of Soria's property that was inside were eventually found by police in a backyard of a house inside the neighborhood in which Petitioner lives. (R.R. IV 07). Soria eventually got some of her property back but was still missing some items. (R.R. III 37). Soria was able to identify Petitioner as the person who committed the robbery and was also able to identify Petitioner from a photo array. (R.R. III 35-36).

The State moved to admit, and the trial court admitted, jail calls that were made by Petitioner. (R.R. IV 25). Petitioner he made various statements relevant to the robbery. (St. Ex. 19). At trial, the State presented Sgt. L. Franks as the sponsor of the evidence. (R.R. IV 12). Sgt. Franks testified that he was the supervisor of the Tactical Intelligence Unit with the Harris County Sheriff's Office. (R.R. IV 13). As part of his duties, Sgt. Franks and his staff are charged with "gathering and disseminating phone calls from the inmates into the jail and out of the jail." *Id.* Sgt. Franks identified Deputy P. Galvan, a deputy over which Sgt. Franks has supervision authority and who compiled the jail calls on a disc, as "also a custodian of records," and that it was the normal business practices of the sheriff's office to retain the calls. (R.R. IV 21). Sgt. Franks

testified about the way the calls could be accessed by people in the Tactical Intelligence Unit. (R.R. IV 18-20).

Petitioner made two objections relevant to the jail calls. First, Petitioner objected that Sgt. Franks was not on the State's witness list. (R.R. IV 14). The court of appeals disposed of this claim on appeal, and Petitioner does not now raise this issue. *See, Bahena*, 604 S.W.3d at 535-37). The second objection was that Sgt. Franks was not the correct custodian of records, but that instead some employee from the private agency who provided the jail call monitoring service, Secure¹, was the proper custodian. (R.R. IV 25). Petitioner cross-examined Sgt. Franks about the storage of the phone calls at Secure. (R.R. IV 24-25). Petitioner objected "Judge we object. He's not the custodian of records for these calls. It's Secure's company is --" (R.R. IV 25). Prior to admission, Petitioner never stated that Sgt. Franks was not a proper custodian as compared to any other deputy in Sgt. Franks' division. Petitioner did not object to its trustworthiness.

¹ The record lists the company as "Secure." *E.g.*, (R.R. IV 24) ("the phone calls that are made are the system called Secure?"). The company is called "Securus," and is also identified as such in the recordings. For consistency with the record, however, this brief will refer to the company as "Secure."

SUMMARY OF THE ARGUMENT

Sgt. Franks sufficiently authenticated the recordings as both records of the Harris County Sheriff's Office and as recordings of Petitioner's statements. The recordings contained Petitioner's statements, which were party opponent admissions, and did not require a layer of hearsay exception or exemption. Petitioner has not identified any statements at issue aside from Petitioner's own statements. Petitioner's claims fail.

ARGUMENT AND AUTHORITIES

Sgt. Franks was a proper custodian of records or otherwise qualified witness. Sgt. Franks demonstrated that he was a custodian or other qualified witness by testifying to his knowledge of how jail calls were made, kept, and disseminated. Petitioner's claim that the trial court erred is without merit.

A. Applicable law and standard of review

Appellate review of a trial court's ruling on evidentiary issues is done on an abuse of discretion standard. *Fowler v. State*, 544 S.W.3d 844, 849 (Tex. Crim. App. 2018). Reviewing courts must uphold a trial court's ruling on admissibility when that ruling is within the "zone of reasonable disagreement." *Id.* Further, "[a] trial court judge is given *considerable* latitude with regard to evidentiary issues," and "[d]ifferent judges may reach different conclusions in different trials on substantially similar facts without abusing their discretion." *Id.* (internal quotation marks omitted). A trial court's ruling will be upheld under any theory of applicable law, even if that theory is not explicitly relied upon. *State v. Esparza*, 413 S.W.3d 81, 85-86 (Tex. Crim. App. 2013).

Rule 902(10) incorporates the requirements of 803(6) to establish a self-authenticating business record. TEX. R. EVID. 902(10). Records of regularly conducted activity are self-authenticating if an affidavit of a “custodian or another qualified witness” shows that, “(A) the record was made at or near the time by-or from information transmitted by-someone with knowledge; (B) the record was made or adopted by the witness when the matter was fresh in the witness’ memory, and; (C) accurately reflects the witness’ knowledge, unless the circumstances of the record’s preparation cast doubt on its trustworthiness.” TEX. R. EVID. 902(10); TEX. R. EVID. 803(6). While a custodian of records is sufficient, 803(6) only requires a person with knowledge of how the record was prepared. *Id.*; *Melendez v. State*, 194 S.W.3d 641, 644 (Tex. App.—Houston [14th Dist.] 2006, pet. ref’d). Rule 803(6) “does not require that the witness be a person who made the record or even be employed by the organization that made or maintained the record.” *Melendez*, 194 S.W.3d at 644.

A qualified witness need only have personal knowledge of the mode of preparing the records. *See, Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref’d). Rule 803(6) does not require that the “custodian” or otherwise qualified witness be the same person who collected or disseminated the records. *See, TEX. R. EVID. 803(6); State v. Villegas*, 506 S.W.3d 717, 734 (Tex. App.—El Paso 2016, pet. dism’d); *Canseco*, 199 S.W.3d at 644.

“Hearsay” is a “statement that the declarant does not make while testifying at the current trial or hearing and a party offers in evidence to prove the truth of the matter

asserted.” TEX. R. EVID. 801(d). A “statement” is “a person’s oral or written verbal expression, or nonverbal conduct that a person intended as a substitute for verbal expression.” TEX. R. EVID. 801(a). A statement that is offered against a party and was made by the party in an individual or representative capacity is not hearsay. TEX. R. EVID. 801(e)(2)(A).

B. The recording of Petitioner’s party opponent statements is not an independent layer of hearsay

At the outset, it is important to note what is not at issue here. Petitioner claims that his trial objection was to Sgt. Franks was a hearsay objection. (Petitioner’s Brief – 11). If that is true, then Petitioner’s claim is easily disposed of because there is only one layer of statements in the recording – the Petitioner’s and the call recipient’s. The records at issue contain the recording of statements made by a party opponent – the Petitioner.² See, TEX. R. EVID. 801(e)(2)(a); *Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999).

The *recording* of Petitioner’s party opponent statement does not add a layer of hearsay that requires an exception or exemption. Petitioner fails to identify what extra statement or layer of hearsay is contained on the disc beyond Petitioner’s own

² The recordings also contain statements made by the recipient of Petitioner’s calls; these statements were not, however, introduced to prove the truth of the matter asserted but were instead relevant to give context to Petitioner’s statements. See, e.g., *Kirk v. State*, 199 S.W.3d 467, 478-79 (Tex. App.—Fort Worth 2006, pet. ref’d)(statements made by police interviewer to Petitioner were offered to give context to Petitioner’s statements, not for the truth of the matter asserted). Regardless, Petitioner does not identify any statements from the call recipients that were hearsay and does not complain about them.

statements. *C.f.*, TEX. R. EVID. 805 (requiring a hearsay exception for each additional layer of hearsay). Instead, the relevance of Sgt. Franks' testimony is to properly authenticate the recordings – that is, demonstrate that the recordings are what they purport to be. *See*, TEX. R. EVID. 901(a)(to authenticate an item of evidence the proponent must “produce evidence sufficient to support a finding that the item is what the proponent claims it is”).³

C. Sgt. Franks was a proper custodian of records or otherwise qualified witness in this case

The records at issue needed to be authenticated, which was done in this case. Whether that authentication was done via a custodian of records or “another qualified witness,” the records were authentic and properly admitted.⁴ Petitioner's claim is without merit.

Whether characterized as the custodian of records or as “another qualified witness,” Sgt. Franks' testimony was sufficient to establish the records as authentic business records and recordings. Sgt. Franks testified that he was the supervisor of the Tactical Intelligence Unit at the Harris County Sheriff's Office. (R.R. IV 13). He testified that “[p]art of our duties are gathering and disseminating phone calls from the

³ The dissent in the court below also believed that a recording of Petitioner's own statements offered against him constituted hearsay *Babena*, 604 S.W.3d at 546 (Hassan, J., dissenting)(analyzing harm for the “erroneous admission of hearsay testimony”). The dissent did not identify what hearsay statement needed an exception.

⁴ Whether there is any difference between the two is irrelevant as the rule allows either. And whether a witness is characterized as a custodian of records does not preclude them from being a qualified witness to lay the predicate for admission.

inmates into the jail and out of the jail.” *Id.* He described the process of identifying and retrieving the audio recordings of jail calls. *Id.* He described the way the jail calls are initially created. He testified that an inmate, who is assigned a SPN (System Person Number), uses that number to initiate a call. (R.R. IV 13-14). He testified that the phone calls are tracked using that number. (R.R. IV 14). The Tactical Intelligence Unit had the capability to “screen” the calls as well. (R.R. IV 18). Sgt. Franks could identify the recorded calls associated with the SPN and retrieve them. (R.R. IV 14). He could then place them into a link or a disc to disseminate the call or calls to the requesting entity. *Id.* The process for recording and saving the calls is “automatic.” (R.R. IV 19). It is the “normal business practice” of the Harris County Sheriff’s Office to keep the calls on file. (R.R. IV 21).

Sgt. Franks’ testimony fulfilled each of the elements of the business record predicate. First, his testimony established that the records were made at or near the time by someone with personal knowledge. TEX. R. EVID. 803(6)(A). Sgt. Franks testified that the calls are automatically recorded and stored when they are made. (R.R. IV 19). Sgt. Franks testified that they then retrieve the calls and put them on a link or disc. (R.R. IV 14). Sgt. Franks testified that, in this case, Deputy P. Galvan – one of his subordinates in the Tactical Intelligence Unit – made the disc, but that Sgt. Franks was the one who marked it. (R.R. IV 22)(explaining that the disc had the wrong name on it because “I put the wrong sticker on the wrong disc”). Sgt. Franks also identified the actual files on the disc as being the correct recordings. (R.R. IV 23).

Second, Sgt. Franks' testimony established that this sort of record was kept in the regular course of the Harris County Sheriff Office's regularly conducted business. TEX. R. EVID. 803(6). Sgt. Franks testified that the Harris County Sheriff's Office gathers these records. (R.R. IV 18). The Harris County Sheriff's Office records "all" calls, except those privileged calls. (R.R. IV 18-19). The process of recording and storing the call is "automatic." (R.R. IV 20). Sgt. Franks described the method that was put into place for inmates to utilize the system and to identify the use of the system. (R.R. IV 14; 20).

Lastly, Sgt. Franks established that making this type of record is the regular practice of the Harris County Sheriff's Office. Specifically, Sgt. Franks stated that it was "[a]ffirmative" that "it's the normal business practice to keep these calls on file for the Harris County Sheriff's Office." (R.R. IV 21). Every call, except legally privileged calls, is recorded and stored. (R.R. IV 19). Sgt. Franks testified that "part of our duties are gathering and *disseminating* phone calls from the inmates into the jail and out of the jail." (R.R. IV 13)(emphasis added). Sgt. Franks described the process of making the record: that the unit receives a request for the record and the unit then uploads the file onto a link or downloads it onto a disc. *Id.*

Sgt. Franks properly authenticated the recordings. Even assuming that there was some additional nebulous statement that required an 803(6) predicate, Sgt. Franks fulfilled that requirement too. Petitioner's claims are without merit.

D. The recordings were otherwise authenticated under article IX, even if Sgt. Franks did not establish a business record predicate

Sgt. Franks' testimony authenticated the recordings as business records. But even without a business records predicate, Sgt. Franks, and the recordings themselves, proved what they were. That is the relevant and important issue here. The evidence supported the fact that the recordings were what they purported to be – recordings of statements made by the Petitioner.

Sgt. Franks testified that calls are assigned to a person's SPN with a four-digit PIN. (R.R. IV 20). The system automatically records and stores the call. *Id.* Sgt. Franks testified that, while he incorrectly placed the wrong name and SPN on the outside of the disc, the files on the disc correctly corresponded to Petitioner. (R.R. IV 22-23). The trial court then admitted the evidence over Petitioner's objection. (R.R. IV 25).

Petitioner attacks the "trustworthiness" of the disc because it was labeled with another inmate's name and because inmates have previously "rented out" their identification to others to make calls. (Petitioner's Brief – 05). The mistake in the name was addressed by Sgt. Franks. He stated that he incorrectly labeled the disc with another inmate's name, but that he subsequently checked the actual files to ensure they were correctly Petitioner's phone calls. (R.R. IV 22). While this may have created a fact issue for the jury, it did not undercut the fact that there was sufficient evidence for the finder of fact to determine the recordings were what they purported to be. *See, Butler v. State*, 459 S.W.3d 595, 600 (Tex. Crim. App. 2015) ("the trial court need only make the

preliminary determination that the proponent of the item has supplied facts sufficient to support a reasonable jury determination that the proffered evidence is authentic”). Further, Petitioner did not question Sgt. Franks about the possibility of some unknown, uncharged impersonator using Petitioner’s SPN and PIN until *after* the trial court admitted the jail calls. The trial court cannot be faulted for not considering testimony that was not raised until after the trial court made its decision.

The evidence established that the jail call recordings were authentic. Sgt. Franks’ testimony established that the recordings were authentic records kept by the Harris County Sheriff’s Office, and that they were authentic recordings of the Petitioner’s various phone conversations. While Petitioner was able to challenge the weight of this evidence by raising the possibility that somebody else used Petitioner’s SPN and PIN, that challenge only goes to the weight of the evidence and not the admissibility. Petitioner’s claims before this Court are without merit.

PRAYER

It is respectfully submitted that all things are regular and requested that this Court
AFFIRM the opinion of the court of appeals.

Respectfully submitted,

KIM OGG

District Attorney
Harris County, Texas

/s/ John David Crump

Assistant District Attorney
Harris County, Texas
500 Jefferson, 6th Floor
Houston, Texas 77002
TBC No. 24077221

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that, according to Microsoft Word, the portions of this brief for which TEX. R. APP. P. § 9.4(i)(1) requires a word count contains 3,327 words.

This is to certify that a copy of the foregoing instrument has been sent through the Texas eFile system to the following parties on February 22, 2021:

Crespin Michael Linton
crespin@hal-pc.org

JOHN DAVID CRUMP
Assistant District Attorney
Harris County, Texas
500 Jefferson, 6th Floor
Houston, Texas 77002
TBC No. 24077221

Date: February 22, 2021

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John Crump on behalf of John Crump
Bar No. 24077221
crump_john@dao.hctx.net
Envelope ID: 50796189
Status as of 2/23/2021 1:14 PM CST

Associated Case Party: Raul Bahena

Name	BarNumber	Email	TimestampSubmitted	Status
Crespin Michael Linton		crespin@hal-pc.org	2/22/2021 6:56:58 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacy M.Soule		information@spa.texas.gov	2/22/2021 6:56:58 PM	SENT